

Nos. 11662-11666

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11662

PHILIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 11666

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

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APPELLEE'S BRIEF.

Jurisdiction.

Appellants were indicted under the Internal Revenue Act of 1942 (26 U. S. C. A. 145(b)). The District Court had jurisdiction under Sections 24 and 340 of the Judicial Code (28 U. S. C. 41(2) and 18 U. S. C. 546) and the Internal Revenue Code (26 U. S. C. A. 145(b)). The offenses charged were committed in the Southern District

of California [R. 2 ff.].¹ Judgments were entered on June 16, 1947 [R. 137-140]. Notices of appeal were filed on June 24, 1947 [R. 205-208].²

This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A. 225).

Statute Involved.

The Internal Revenue Code (26 U. S. C. A. §145(b)) provides as follows:

“Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.”

¹The references preceded by “R” are to the printed record on appeal; those preceded by “O. A. B.” are to appellant Ormont’s opening brief before this Court, and those preceded by “H. A. B.” are to appellant Himmelfarb’s opening brief.

²Appellants, although named jointly in one indictment and in each count of the indictment, and tried jointly in a single trial, presented separate appeals, with separate briefs, to this Court. The Government has no objection to this procedure here by appellants; nevertheless, with the permission of this Court, the Government will continue to treat the two appeals as one matter, and will present only this one brief in reply.

Statement of the Case.

Appellants were indicted on January 22, 1947, in the United States District Court for the Southern District of California, in four counts. Count One charged that appellants Ormont and Himmelfarb attempted to defeat and evade Federal income tax owed by appellant Ormont for the calendar year 1944 by filing a false return understating Ormont's net income and income tax for that year [R. 2-3]. Count Two contained similar charges against both appellants in connection with appellant Himmelfarb's return and income and tax for 1944 [R. 3-4]. Counts Three and Four contained similar charges against appellant Ormont alone, as to his return and for 1943 and 1942, respectively [R. 4-6].

Appellants' motions to dismiss the Indictment [R. 6-41] and their motion for bills of particulars [R. 42-71], were denied, after hearing, on March 12, 1947 [R. 73-76] except that the motion for particulars was granted in certain respects [R. 75-76], and those particulars were subsequently furnished by the Government to appellants [R. 76-78].

On March 28, 1947, appellants each pleaded not guilty to each of the counts in which they were charged [R. 79].

On May 2, 1947, the Government's motion [R. 80ff] to consolidate for trial the within income tax evasion case together with another case pending before the District Court against the same defendants charging violations of the Emergency Price Control Act [R. 151-203], was denied [R. 85].

Thereafter a jury trial was had in the District Court from May 23 to June 13, 1947, inclusive [R. 302ff].³ One June 13, 1947, the jury found Ormont guilty upon Count One of the Indictment, and Himmelfarb guilty on Count Two [R. 133], the trial court having previously dismissed Counts Two, Three and Four of the Indictment as to Ormont, and Count One as to Himmelfarb.

After denying motions for acquittal and for a new trial [R. 134-136], the trial judge, on June 16, 1947, sentenced each of the appellants to imprisonment for a term of one (1) years and one (1) day [R. 136-140].

Statement of Facts.

We state below the facts most favorable to the Government. These differ to a considerable degree from the purported "facts" which appellants in their separate briefs (O. A. B. 1ff; H. A. B. 5ff) bring before this Court.⁴ The facts upon which the Government relies, are these:^{4a}

³Appellants at no time made any motion for separate trials upon the income tax charges.

⁴Appellants, in placing in their briefs conflicting testimony and evidentiary matters, selected excerpts favorable to themselves, argumentative matters, and material going to the credibility of witnesses, have disregarded the controlling rule that upon appeal from a judgment in a criminal case, only the facts most favorable to the Government will be considered by the appellate court in its determination of the sufficiency of the evidence. *Hemphill v. United States*, 120 F. (2d) 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627. Appellants have also placed in the record before this Court in these cases, more than 150 pages of matters which occurred in the case brought against them under the Emergency Price Control Act [R. 80-86, 141-203, 214-301], and which have nothing to do with the instant appeals, as we show more fully below.

^{4a}We are omitting from this recital of facts such facts as pertained exclusively to counts which were dismissed in their entirety by the court below.

On or about the 15th day of March, 1945, Ormont filed in the Office of the Collector of Internal Revenue at Los Angeles, California, a Federal income tax return [Gov. Ex. 3] on which he declared, under penalties of perjury, that his gross income for the year ending December 31, 1944, was \$12,674.75, his net income for income tax purposes was \$12,174.57, and the tax due on it was \$3,626.58 [R. 320-321, 339, 341, 342, 344-345].⁵ Ormont also paid the entire tax thus reported by him [R. 362]. Ormont's true gross income for that year, as shown by facts discussed in considerable detail below, was \$37,482.52, his net income tax income was \$36,982.52, and his true tax due on it was \$18,143.12.

On or about March 14, 1945, Himmelfarb filed a Federal income tax return [Gov. Ex. 4], showing his gross income for the same period as \$4,611.74, his net income for income tax purposes was \$4,111.74, and his income tax as \$656 [R. 341, 342, 344-345].^{5a} Himmelfarb's true gross income for that year was \$18,252.65, his net income for income tax purposes was \$17,752.65, and the correct tax due was \$5,843.91 as shown below.

On May 18, 1945, the Federal Bureau of Internal Revenue made known to appellants the fact that their income tax returns for the calendar years 1942 to 1944, inclusive, were under investigation, by requesting permission to examine appellants' books and records. Appellants thereupon immediately sought the advice of an attorney and an accountant, and upon their advice filed jointly, on

⁵The returns, in evidence, were transmitted in their original form, as were all other exhibits in this case, to this Court [R. 209-210].

^{5a}This return was on a community property basis. Himmelfarb's wife filed a separate return.

May 24, 1945, a Partnership Return of Income showing additional, previously unreported income, for the period from May 1, 1944 to April 30, 1945, in the sum of \$71,388.84 [R. 383, 1091ff; Gov. Ex. 6].⁶

Between 1931 and 1944 Ormont operated a wholesale meat business alone and with others, under the fictitious name of Acme Meat Company, at 3301 E. Vernon Avenue, Vernon, California. From at least May 1, 1944, and through April 30, 1945, Ormont and Himmelfarb operated the Acme Meat Company as partners [R. 913, 925, 926, 928. See also, R. 432, 944, 1035-1036; Gov. Ex. 44]. This business was conducted, and a regular set of books was kept, on a calendar year basis [R. 395-405, 450, 457-460].⁷

⁶For the convenience of this Court, we have prepared the table below from the evidence in the case:

ORMONT

	<i>1944 Return</i>	<i>True Figures</i>
Gross income	\$12,674.57	\$37,482.52
Allowable deductions	500.00	500.00
Net income	12,174.57	36,982.52
Income Tax	3,626.58	18,143.12

HIMMELFARB

	<i>1944 Return</i>	<i>True Figures</i>
Gross income	\$ 4,611.74	\$18,252.65
Allowable deductions	500.00	500.00
Net income	4,111.74	17,752.65
Income Tax	656.00	5,843.91

⁷Most of the evidence in the record related to the joint operations of both Ormont and Himmelfarb insofar as their 1944 earnings were concerned. The trial judge carefully limited the evidence as it was introduced into the record to the appellant to whom it applied. We shall relate in general form what the facts in that respect show on an over-all basis, and then point out specifically what facts are applicable to each of the appellants separately.

Income from sales of meat, made by each of the appellants [R. 429-435], within the ceiling prices set by the Office of Price Administration during the period of price control on meat, which included the period material here, was usually reported on invoices and recorded on these books [R. *id.*]. And the figures on the 1944 income tax returns upon which this case is based, were based by appellants upon these ceiling, recorded prices.

In addition to that income, each of the appellants received as income from the sale of meat certain "bonus" or "overceiling" payments, which consisted of additional cash sums of money, paid by appellants' regular meat customers in connection with their purchases of meat from the Acme Meat Company, in addition to the legal ceiling prices reported on appellants' books [R. 427-428].

These additional "bonus" payments were not recorded on appellants' books [R. 435]. nor were such sums reported by either appellant as part of his income for income tax purposes for the calendar year 1944 upon his income tax return for 1944 [Gov. Exs. 50 and 51].

In addition, certain sales and income from them in some instances were shown on invoices, but the invoices were not transmitted to the Acme Meat Company's bookkeeper by appellants, and as a result were not entered on its books, nor was that income included as part of the gross or net income for 1944 reported by appellants for income tax purposes on their calendar year returns [R. 414ff].

These additional, unreported "bonus" receipts were recorded, in part at least, upon sheets of paper by both of the appellants, and these lists were kept by them in a desk drawer at the plant [R. 429, 433-435].

Appellant Ormont also deliberately falsified his business financial records in other important respects for other purposes [R. 401-409, 448-450, 470-471, 472, 483, 487]; caused to be falsified on the books the distribution of the net income or profits as between Ormont and Himmelfarb for 1944 [R. 436, 438-440]; and later drew various checks to cover-up his original falsification [R. 504 See also R. 471-490], and he caused to be falsely shown on the books the appellant Himmelfarb as an employee, rather than as was the fact, as a partner [R. 873-888], for purposes of obtaining certain governmental subsidies or allowances to which appellants would not otherwise be entitled [R. 438-440].

While Ormont's 1944 income tax return was being prepared for him by his bookkeeper from the books of the Acme Meat Company, the bookkeeper held conferences with Ormont as to facts concerning Ormont's total income, and obtained certain factual material furnished by Ormont in that connection [R. 421-425, 465-468]. In response to the bookkeeper's inquiry to Ormont as to whether the Acme books showed the total of Ormont's income for 1944, Ormont gave the bookkeeper certain additional figures of income from bonds [R. 424-425]. Ormont however did not disclose at that time the sum of more than \$71,000 later reported by Ormont and Himmelfarb as income in the partnership return (see *infra*).

The bookkeeper later reported other of Ormont's activities to Government officials [R. 498-499].

Agents of the Bureau of Internal Revenue, as stated before, conducted an investigation into the income tax returns and the income of each of the appellants for the years 1942, 1943 and 1944 [R. 507-600, 873-888, 913-

1014, 1017-1053]. The agents, in conducting their official investigations, examined, and the Government later introduced in evidence at the trial below, appellants' individual income tax returns for those years; a so-called "partnership return" on which appellants had declared more than \$71,000 additional income; bank records and all bank documents pertaining to accounts of each appellant, of which the agents made transcripts, carried at various banks by each of the appellants under their own names and as the Acme Meat Company; records of dealings by Ormont with a stock brokerage firm; records of other concerns and individuals who had dealt with appellants; invoices; cancelled checks; transcripts of portions of the books and records of the Acme Meat Company; invoice lists of appellants' personal property; bonds and records of bonds; and other items [R. *passim*].

After the Government agents had begun their investigation, appellants submitted various documents and statements to the agents respecting appellants' 1944 income. These included a net-worth statement for each of the appellants, letters, affidavits and statements of balances [Gov. Exs. 50A-D, 51A-D].^{7a} The Government agents held numerous conferences concerning these matters with appellants [R. 584, 1023-1025], who furnished the agents with much additional information as to appellants' income, as is disclosed more fully below.

^{7a}All of these have been reproduced in the Appendix to this brief for the Court's convenience.

During some of these conversations, Ormont apparently lied to the agents respecting his income in 1944 [R. 1025-1027], and he also sought to confuse the agents in that regard [R. *ibid*].⁸

On May 24, 1945, Ormont and Himmelfarb filed a joint partnership return, showing additional and previously unreported income of more than \$71,000 for the period from May 1, 1944, to April 30, 1945 [see Appendix hereto; R. 1038; Gov. Ex. 6].

On May 24, 1945, during the investigation, appellant Ormont, having been warned of his constitutional rights by the agents [R. 1030, 1035, 1043, 1136-1137], informed them that he wanted to tell the truth concerning his income for 1944, that "the thing had been bothering" him and he wanted to "get it off" his "mind so that" he "could go around and look people in the face again" [R. 1031, 1173].

The overcharges collected by appellants were not uniform and fluctuated [R. 1039, 1180, 1181]. Ormont declined to disclose the names of any customers [R. 1039].

Ormont admitted that this income was not reported on his individual Federal income tax 1944 return [R. 1175].

The agents told Ormont that they wanted to discuss his income tax liability and income tax affairs with him, that

⁸At the trial, the agents testified in detail as to specific facts and figures disclosed by their investigations and audits, based in great part upon the documentary exhibits in evidence [R. 522 ff]. Appellants did not at any time produce at the trial their books and records, although they repeatedly sought to keep out secondary evidence as to those documents. The agents were cross-examined in minute detail at very great length as to these items and other alleged facts placed before them by appellants' counsel [R. 601-873, 1055-].

he had the right to be accompanied by an attorney, and have the counsel of an attorney, if he desired; that he was not required to give any testimony; and that any statements he made or documents he produced might be used in court against him in some matter at some future time. Ormont asked specifically whether any statements he made to them might become available to other Government agencies, and he was told that normally any information given the Internal Revenue Department would be held in confidence by that department, but that if a criminal trial should follow, such information might be disclosed at any such trial. Ormont then said that he did not care to have an attorney present, that he did not think he needed one in order to tell the truth, that he did not want to have any trouble; that he wanted to pay whatever was due the Government [R. 1136-1137]. (See, *e. g.*, *Heller v. United States*, 57 F. (2d) 627 (C. C. A. 7), cert. den. 286 U. S. 567; *Viereck v. United States*, 139 F. (2d) 847 (App. D. C.), cert. den. 321 U. S. 794; *Shubin v. United States*, F. (2) (C. C. A. 9).)

Ormont then stated that he had made quite a large sum of money [R. 1137].⁹

Ormont stated that he and Himmelfarb had had an indefinite business arrangement which was somewhat similar to a partnership or joint venture business, but that he did not want it commonly known that they had such an arrangement because of fear that some other Government agency might cause him embarrassment; he said that he had been receiving certain subsidy benefits, to which another Government agency might challenge his

⁹As to the facts relating to the May 24 statement and events, see also R. 1035-1046, 1072-1078.

right since he had represented to other agencies that he was doing business as an individual or sole proprietor, whereas in fact he and Himmelfarb had an arrangement which began on May 1, 1944, whereby they would share equally from the "legitimate" profits of the Acme Meat Company, wholesalers and packers of meat [R. 1137-1138].

Ormont's answer to the inquiry whether he and Himmelfarb was partners, was evasive and qualified [R. 1067]. He said he preferred the association to be known as something other than a partnership "because of the jeopardy it would place" him in as to his slaughtering license and "subsidy to the R. F. C." (Reconstruction Finance Corporation) for the reason that appellants had represented Himmelfarb as an employee [R. 1068].

Ormont said he and Himmelfarb shared equally in such "legitimate" profits as to the first \$24,000 and that any legitimate profits above that sum belonged to him [R. 1139].

Ormont next disclosed that he had other profits resulting from "bonuses" or overcharges received from customers. He said he preferred to call such overcharges "bonuses" or gifts because of the fact that he might get into difficulty with other governmental agencies [R. 1138].

Ormont then revealed that these "bonuses" totalled more than \$71,000.00 for the period from May 1, 1944 to April 30, 1945 [R. 1138].

Ormont admitted that no books or records were kept as to these side profits or "bonuses" received from the customers of the Acme Meat Company [R. 1138]. He stated that these side charges or "bonuses" from the cus-

tomers of the Acme Meat Company had not been uniform, that these overcharges or excess charges fluctuated and were determined by how much the customers were willing to pay "on the side" [R. 1138].

Ormont then stated that he did not want it known that they had gotten those overcharges, for fear of cancellation of the license of the Acme Meat Company to do business as a packing house or as a wholesaler; that, he said, was his principal concern. Ormont said that he wanted to pay whatever taxes he owed, which he and Himmelfarb, his associate, had not reported in their 1944 individual returns [R. 1139].

Ormont was then asked whether he had a record of such unrecorded profits, whereupon he produced a small memorandum book in which he had a few figures recorded showing, according to Ormont, the net profits from the unrecorded overcharges for the period from May 1, 1944 to January 5, 1945, and also the total profits or bonus collections for the period from January 5, 1945, to April 30, 1945 [R. 1139; Gov. Ex. 53. See Appendix hereto].

These figures totaled about \$35,000 received by Ormont personally, about \$11,000 of which was recorded as having been earned from the secret and unrecorded charges or bonuses from May 1, 1944, to January 5, 1945, and the balance, some \$23,000, was recorded as having been earned from excess charges and unrecorded charges or cash collections or bonuses from customers during the period January 5, 1945, to April 30, 1945 [R. 1139].

Ormont said that he had talked with Himmelfarb regarding their dilemma and worry about having gotten these secret charges on the side, and he said that he

wanted to do whatever he could to straighten the matter out, to pay up quickly, that he wanted to be able to walk around and look people in the face again, that he had worried a lot about the matter [R. 1140].

Ormont disclosed to the agents that he and Himmelfarb usually collected these excess or unrecorded charges in cash daily from their customers; that Himmelfarb made most of the collections from the meat customers at the same time they paid their regular bills; that in addition to these invoice bills he would collect varying unrecorded sums in cash on the side and the amounts would depend upon the fluctuating market, whatever the supply of meat would indicate [R. 1141].

Ormont revealed that he and Himmelfarb divided equally their profits every day, sometimes every three days, sometimes maybe three times a week; that they each kept a memorandum of the amount that they divided and that each time they made a division of these unrecorded cash profits, they added to that amount which they divided that day, the total of the amounts previously divided by them and that they kept only that running balance, with no other books or records of these extra charges which they collected [R. 1141].

Ormont also said that he had talked over with Himmelfarb the fact that neither one of them had reported this extra income on their individual 1944 returns, and that he felt that Himmelfarb would cooperate with the agents. The agents advised Ormont that they planned to interview Himmelfarb immediately [R. 1141].

Ormont was then asked whether it was agreeable to him if the agents prepared an affidavit for him to review and sign [R. 1141]. An affidavit was prepared in long-hand, and the agents went over each sentence with Or-

mont [R. 1141-1142], who was then sworn, signed the affidavit and left it with the agents [R. 1142].

In the Acme Meat Company's office, later that day, Ormont, Himmelfarb, one Special Agent, and two Deputy Collectors being present, Ormont stated that he wanted to see the affidavit he had signed. He was then holding in his hand a similar affidavit form which the agents had prepared for Himmelfarb to sign. Ormont said he wanted "to compare them," that he did not think they were the same, or consistent with one another. The agents thereupon let Ormont see the same affidavit he signed [R. 1145]. Thereupon Ormont began folding the two affidavits together. The Special Agent placed his hand firmly upon the affidavits and advised Ormont not to destroy them. Ormont then began to twist the affidavits and, "jumping like a wrestler" he bolted out the door, "down the bloody spillway" with the affidavits, which were not seen again by the agents [R. 1145-1146].

Himmelfarb was present throughout this incident [R. 1146].

The affidavit previously signed by Ormont and later destroyed by him stated that Ormont had received approximately \$35,000 extra income or "bonuses" which had not been reported on his individual or company books and records; that the portion of this income which he had received in 1944, he had not reported on his individual Federal 1944 income tax return [R. 1147-1148].

In connection with the investigation of their income, appellants hired a certified public accountant [R. 1091, 1093, 1101-1102]. The accountant prepared various documents on behalf of appellants, and, after the appellants signed some of them, the accountant sent them to the

Government agents conducting the investigation [See Appendix]. These documents contained factual data, which the accountant had obtained from appellants, and from their books and records and other sources of information which they furnished to him [R. 1120].

The accountant likewise prepared and filed the "Partnership Return," which each of the appellants signed [R. 1132, Gov. Ex. 6; see Appendix], reporting more than \$71,000 previously unreported income [R. 1125]. This return disclosed the division of this sum as going to "Sam Ormont, 50 per cent, \$35,694.42" and "Philip Himmelfarb, 50 per cent, \$35,694.42" [Gov. Ex. 6; R. 1127-1128]. The accountant had thus made the division upon instructions and based upon information furnished by the appellants [R. 1128].

On a later occasion, Ormont led the agents to his bank safe deposit box and showed them numerous bonds, which he admitted he had bought in part with the 1944 "overcharges" [R. 1150, 1190-1191].

Appellant Himmelfarb did not testify at the trial. He introduced character evidence [R. 1287-1293] and the testimony of an accountant, who in the main performed certain mathematical computations on behalf of Himmelfarb on the basis of the records in evidence [R. 1267-1286].

Ormont testified on his own behalf to a limited extent [R. 1297-1315], and introduced character and other evidence [R. 1329-1349].

SECTION A.

ARGUMENT AS TO APPELLANT ORMONT.

We shall discuss in this section the contentions made by appellant Ormont. In the next section of this brief, we do likewise as to Himmelfarb.

The brief presented by appellant Ormont on this appeal is difficult to answer briefly because of its unusual length and its unusual organization.

At the outset it should be noted that Ormont's brief places before this Court carefully selected excerpts from the evidence in the record, and does not bring forward the facts most favorable to the Government.

Ormont's brief also delineates in considerable detail every step taken on his behalf, devotes much space to re-statements of matter already in the record on appeal before this Court, presents 47 questions on appeal (O. A. B. 1-22), states in full 80 separate "specifications of error" (O. A. B. 22-87), repeats 21 of these specifications in an "Appendix" to the brief, and then argues only 37 of the total number (O. A. B. 88 ff.).

What appellant Ormont is apparently seeking to accomplish by his brief, is to obfuscate the true issues in the case and confuse this Court. In addition, Ormont in effect seeks to have this Court search through the entire record on appeal in an effort to find some error justifying reversal of the judgment below.

Without arguing, explaining or even stating his reasons for his contentions that prejudicial error exists in the multitudinous instances and incidents which he has simply thrown together in his brief, appellant recites page after page of matters occurring at the trial, bits of testimony, and excerpts from objections and rulings.

We do not think that this Court will require the Government to guess what legal basis for his objections in each of the hundreds of such items quoted by him appellant Ormont had in mind or wishes to have considered upon this appeal. And we do not believe that it is incumbent upon the Government to set up hundreds of legal straw men and knock them down in order to protect itself against reversal and preserve its rights in every possible respect.

We shall confine ourselves in this argument, therefore, to issues presented by Ormont on this appeal which are predicated upon some legal argument made by him in his brief.

Point I.

Appellant Ormont asserts (O. A. B. 88-93) that he was subjected to double jeopardy at the trial when after a dismissal of the jury which had been impanelled in this case, another jury was called and impanelled and the trial proceeded as to both Ormont and Himmelfarb before the second jury.

After the first jury had been impanelled, but before the trial had begun, attorney Katz, counsel for appellant Himmelfarb made a motion for a mistrial on the ground that some time during the selection of the jury and before it was impanelled some statement, to which he did not object at that time, had been made by Government counsel [R. 257-258]. As admitted by attorney Katz during his argument upon the motion for the mistrial, such a motion could not have been made by appellants at the time of the incident because the jurors had not then been impanelled [R. 258]. The court granted the motion, and it was stipulated by all counsel, including counsel for Ormont, that the jury

could be excused without being brought back to court [R. 260].

Counsel for Ormont was present throughout all proceedings, including the proceeding in which the motion to dismiss the jury was made and granted.

Furthermore at a preceding session in this case, the court, addressing counsel for both appellants, asked whether "in view of the fact that there are two defendants and each have separate counsel, may it be agreeable that any motions or objections or stipulations made by either defendant will be made on behalf of both defendants unless they are specifically disclaimed?" Both counsel, for Ormont and Himmelfarb, stated that this was satisfactory, and upon inquiry of the court as to whether they so stipulated, both counsel replied in the affirmative [R. 240].

Subsequently, two days later, counsel for appellant Ormont moved to dismiss the indictment as to him on the ground that he had been placed in jeopardy [R. 303]. Counsel for appellant Himmelfarb declined to join in the motion on his behalf [R. 303].

When the trial judge pointed out to Ormont that it was his understanding that the motion had been joined in by both defendants, counsel for Ormont admitted that he knew the court had "acted under that understanding"; that he purportedly did not intend to join in the motion for a mistrial, but admittedly "did not state anything to the contrary"; and then sought to limit the extent of his original stipulation under which motions and objections of one counsel for the defendants were deemed to have been joined in by both unless the contrary was expressly stated by the non-joining attorney [R. 303-4]. Counsel for appellant Himmelfarb, embarrassed by this clearly improper

manoeuvre, then stated that his understanding of the agreement as to motions and objections was that it applied to both defendants when made by either unless specifically rejected by one of them [R. 305]. Counsel for appellant Himmelfarb stated that the action in this respect of counsel for Ormont was such that he was "somewhat caught by surprise in so far as this motion is concerned" [R. 305].

The Government was not only similarly surprised by Ormont's counsel's action in that respect in the court below, but is frankly astounded at finding it being urged before this Court at this time. We submit that this Court should not now tolerate any attempt on the part of appellant Ormont to misuse a situation which was of his own creation, and which was properly handled by the court below. *E. g. Logan v. United States*, 12 Sup. Ct. 617; *Simmons v. United States*, 12 Sup. Ct. 171.

Moreover the mere impanellment of a jury without more does not constitute a placing in jeopardy of the type which precludes a further trial by another jury. See, *e. g. Lovato v. N. M.*, 37 Sup. Ct. 107; *Brady v. United States*, 24 F. (2d) 399 and cases cited; *People v. Bennett*, 114 Cal. 56.

Every act and statement at the trial and in the proceedings prior thereto was had and taken in the presence of both appellants. While appellant Ormont (O. A. B. 91-93) urges that his personal consent is required to every act of his counsel in court, and cites some state cases in support of that contention, he is clearly in error as to the law. For it is well settled that a defendant represented by his counsel at the trial is deemed to concur in the statements and acts of his counsel and that his counsel may act at all times on his behalf.

Point II.

Ormont complains that the Indictment is defective; that he was improperly denied the bill of particulars which he sought, and that his motion for a continuance was likewise denied (O. A. B. 94-97).

The indictment used in this case is a standard indictment which has been used in dozens of cases throughout the country, and has always been found sufficient. See, *e. g.* *United States v. Simmons*, 96 U. S. 360; *Rose v. United States*, 128 F. (2d) 622 (C. C. A. 10), cert. den. 317 U. S. 651; *Capone v. United States*, 56 F. (2d) 927 (C. C. A. 7), cert. den. 286 U. S. 553; *United States v. Skidmore*, 123 F. (2d) 604 (C. C. A. 7), cert. den. 315 U. S. 800; *Guzik v. United States*, 54 F. (2d) 618 (C. C. A. 7), cert. den. 285 U. S. 545; *O'Brien v. United States*, 51 F. (2d) 193 (C. C. A. 7), cert. den. 284 U. S. 673; *United States v. Muro*, 60 F. (2d) 58 (C. C. A. 2); *United States v. Clayton-Kennedy*, 2 Fed. Supp. 233 (Md.).

The cases cited by Ormont in support of his contention in this respect (O. A. B. 95), are of no aid to him.

While it is true that in Count One the return was described as an "income and victory tax return," it is clear that the words "victory tax" are mere surplusage. There was no "victory tax" for 1944, and no return for such a tax. Plainly Ormont was not and could not have been misled. The inclusion of the words "victory tax" in the count did not constitute reversible error and did not in any way effect Ormont's rights by their presence in that count.

Likewise without merit is appellant Ormont's objection to the denial of the court for a bill of particulars coextensive with Ormont's demand (O. A. B. 96). A bill of

particulars was granted [R. 76-77] and provided complete details as to the items which the Government was required to establish.

Any further disclosure in a bill of particulars of the type demanded by the appellants would constitute a disclosure of the Government's evidence. No error was committed by the action of the court below in this case since the granting of a bill of particulars is a matter of discretion with the trial court (see *e. g.*, the *Clayton-Kennedy*, *Skidmore*, and *Rose* cases, *supra*; also *Maxfield v. United States*, 152 F. (2d) 593 (C. C. A. 9); *United States v. Wexler*, 79 F. (2d) 526 (C. C. A. 2), cert. den. 297 U. S. 703; *United States v. Kushner*, 135 F. (2d) 668 (C. C. A. 2), cert. den. 320 U. S. 212.

There is likewise no merit to Ormont's contention that his motion for a continuance was improperly denied. Even a cursory examination of the record before this Court will disclose that appellants not only had ample opportunity to develop their case, but took full advantage of that opportunity in both their cross-examination of the Government's witnesses and the presentation of their case.

Point III.

Ormont asserts (O. A. B. 98-104) that the lower court improperly denied his "motion for immunity" and his "motion to suppress all evidence on the ground that he had obtained immunity previously" because of certain testimony given by Ormont before the Federal grand jury a long time before the instant case was returned, by another grand jury. The motion by Ormont was not to suppress just the evidence adduced before the grand jury—which, by the way, was not offered in the instant case—but to

suppress *all* the evidence in this case. The reasons for Ormont's motion to this effect are confusing.

The matter before the grand jury to which Ormont refers as conferring immunity upon him had nothing to do with the income tax prosecution in this case. It involved testimony on the part of Ormont with reference to certain overcharges which he was compelled to pay to the Southern California Meat Company and certain individuals in connection with his dealings with them in meat.

Nothing in the instant case relates to overpayments by Ormont to anyone else; in fact any overpayments which he made tend to reduce his true gross income which he is charged with in this case with having understated.

The case against appellants, involving overcharges on their part in violation of the Emergency Price Control Act, was nowise connected with the grand jury testimony to which appellant now refers. Nothing was asked Ormont before the grand jury which related to his overcharges; those alone constitute the basis of the so-called "O.P.A." case, not the instant case, against him in the District Court.

Plainly Ormont acquired no immunity from prosecution for an income tax evasion by having been asked to testify that he overpaid to someone else in another matter. In fact, Ormont denied before the grand jury that he made any overpayments, and asserted instead that the payments which he made were all legitimate charges.

The District Court examined the entire matter fully and concluded that "motions for immunity" and suppression of evidence were without merit. We submit that is still the case.

Point IV.

Appellant Ormont objects to the admission in evidence of the income tax returns which constitute the basis of the counts in the indictment (O. A. B. 104-111). Since he was convicted only upon Count One, his objection obviously falls as to the returns which related to the succeeding counts.

The basis of his objection to the admission of his return for the year 1944 is that the return was described in Count One as "income and victory tax return" whereas actually it was only an income tax return.

We have already pointed out above in connection with POINT II that the words "victory tax" constitute mere surplusage and did not in any way materially prejudice or effect Ormont's rights. The gist of the offense here is a wilful attempt to evade and defeat. The words "victory tax" were neither necessary nor descriptive of the charge, as Ormont appears to argue in his brief, and the cases cited by him in support of his contention in this respect are of no aid to him. See, *e. g.* *United States v. Simmons*, 96 U. S. 360; *United States v. Ragen*, 314 U. S. 513; *United States v. Schenck*, 126 F. (2d) 702 (C. C. A. 2); *Wiggins v. United States*, 64 F. (2d) 950 (C. C. A. 9), cert. den. 290 U. S. 657; *Gusik v. United States*, 54 F. (2d) 618 (C. C. A. 7), cert. den. 285 U. S. 545.

The Indictment in Count One clearly and fully sets forth the necessary facts sufficient to charge the offense involved, and the admission of Ormont's income tax return for the year 1944 was proper.

Point V.

The admission of certain invoices of the Acme Meat Company for the year 1942 is urged as error (O. A. B. 112-113).

Since Count Four, which involves Ormont's income for 1942, was dismissed by the court, Ormont's contention with respect to these invoices is clearly without merit. (See Point XII, *infra*.)

Point VI.

Ormont next objects to certain questions asked by the Government counsel upon redirect examination of one of the agents of the Bureau of Internal Revenue who examined the books of the Acme Meat Company, upon a subject which was developed extensively by Ormont's attorney upon cross-examination (O. A. B. 113-115). The ground for objection is not clear.

The control over the propriety of questions at the trial was wholly within the trial court's discretion, and unless prejudicial error can be demonstrated by appellant, his objection to the admissibility of testimony and other evidence is plainly without substance.

We see no ground for reversal in the objections raised.

Point VII.

Other testimony is objected to by Ormont (O. A. B. 115-117), also upon grounds not clear. At any rate, appellant Ormont believes that reversible error has been committed because a witness testified in some way at one point and the court originally overruled an objection, but later sustained it, and because the testimony admitted at the time the objection was overruled may have remained in the minds of the jurors.

In the light of the overwhelming evidence of guilt present in this case as to appellant Ormont, we do not believe that the particular incident referred to at this point constitutes reversible error.

Point VIII.

Ormont objects to the testimony regarding his statements at a conference on May 24, 1945 (O. A. B. 117-122, Appendix pp. 5-9). His objection seems to be predicated upon the contention that he was not fully warned of his constitutional rights at the time that he had his conversation with the Government agents on that date.

The record conclusively demonstrates [R. 1029, 1032, 1136] that Ormont was fully warned of his right against self-incrimination, and that his statements to the agents on that date were induced by a deliberate desire on his part to make known all of the facts with respect to his income. It should be noted that Ormont and Himmelfarb had few days previously consulted both an attorney and an accountant, having found out that they were being investigated by the Bureau of Internal Revenue, and Ormont had not only thereafter come to the office of the investigating agents for the purpose of making the disclosures, which are now objected to by him, but had also filed a partnership return on May 24, 1945, and had had prepared by his accountant other additional factual information which was submitted to the investigating agents (see Appendix hereto). See, also, *c. g. United States v. Sullivan*, 98 F. (2d) 79 (C. C. A. 2); *United States v. McCormick*, 67 F. (2d) 867 (C. C. A. 2), cert. den. 291 U. S. 662.

While we concede that the law relating to confessions and admissions requires that certain safeguards be present,

none of the statements of Ormont to the agents can be considered either a conversation or an admission, and consequently the cases which Ormont cites in connection with such conversations and admissions, are inapplicable. However, we submit, that on the basis of the record before this Court as to precisely what was said to Ormont by the agents before he made his disclosures to them, even a confession or admission would have been admissible in evidence had either been obtained from Ormont following the warning as to his rights given to him by the agents, and following his consultation with his attorney and accountant on the preceding days as to the procedure to be followed by him in this matter. See, *e. g.* *Wiggins* case, *supra*; *Benetti v. United States*, 97 F. (2d) 263 (C. C. A. 9); *Nicola v. United States*, 72 F. (2d) 780 (C. C. A. 3).

Point IX.

Ormont objects to the introduction of certain exhibits which he submitted voluntarily to the investigating agents, and to the testimony of his accountant who prepared those exhibits (O. A. B. 122-124). Since he voluntarily submitted the exhibits in question, he clearly has no cause to complain. There is no confidential relationship between an accountant and his client in this state; and none of the authorities cited by Ormont support him in this respect.

Moreover, the testimony of the accountant admitted in evidence related to the documents which he prepared at Ormont's request and sent to the agents, and which were admitted in evidence at the trial [R. 1109-1134].

Point X.

Next appellant Ormont objects to the denial of his motion to strike the testimony of a Government agent with reference to statements by Ormont to him subsequent to May 24, 1945, on the ground that on that date Ormont was "threatened with prosecution for destroying Government property" (O. A. B. 124-125).

This argument is particularly specious in view of the facts which we have related above, as to the incident which involved the discussion of affidavits by Ormont, which had previously been in the possession of the investigating agents. We submit that there is nothing in the record which supports Ormont's contention that he thereafter acted in fear and made statements involuntarily.

There is likewise no record basis for Ormont's present contention (O. A. B. 125) that he understood that the information he furnished to the Internal Revenue Agents would be kept confidential, and that he would be permitted to adjust his difficulties resulting from his failure to declare his true income by some payment of money. See, *e. g.* *Spies v. United States*, 317 U. S. 492; *United States v. Sullivan*, 98 F. (2d) 79 (C. C. A. 2); *United States v. McCormick*, 67 F. (2d) 860 (C. C. A. 2), cert. den. 291 U. S. 662; *United States v. Lustig*, 67 F. (2d) 306. This argument, as well as almost all others in this case, demonstrates the length to which appellant Ormont will go in attempting to obtain a reversal of the judgment below. In the face of the record against him, it is not surprising that he should make such attempts as this. However, they are clearly without merit.

Point XI.

Error is assigned in the denial by the trial court of Ormont's motion for acquittal on the ground of insufficiency of the evidence (O. A. B. 125-130).

It would serve no useful purpose to repeat here the evidence upon which the Government relies in support of the verdict and the judgment below. We have already delineated in considerable detail the facts most favorable to the Government, and we submit that they amply warrant the verdict of guilty with reference to the return for the year 1944.

In brief, however, it can be stated that the facts conclusively demonstrate that appellant Ormont deliberately and wilfully concealed from the Bureau of Internal Revenue a substantial part of his income for the year 1944 and paid no tax upon it as required of him by law.

Income from overcharges or bonus payments in the sale of meat, received by Ormont in his business during 1944, amounted to more than \$35,000, in addition to the sum which he reported as income on his return for 1944.

When confronted with an investigation of his income and return for that year, as well as preceding years, Ormont sought to further defeat the lawful process and his obligations by filing a partnership joint venture—fiscal year return.

The jury, which had the exclusive power of drawing the necessary inferences from the evidence before it and of determining the ultimate facts in the case, properly reached the conclusion that the fiscal year return did not truthfully represent Ormont's business relations, and that at least that part of the income which was earned between May 1, 1944 and December 31, of that year, and included

in that joint venture—fiscal year return, should have been included upon, and was wilfully omitted by Ormont from his calendar year return for 1944.

Upon the books and records in evidence, the testimony of the investigating agents, the documents prepared by Ormont's accountant and submitted to the agents, the partnership return, Ormont's original return, and all the other evidence in the case against Ormont, the jury below was fully justified in reaching the verdict that he was guilty as charged in Count One of the Indictment. See, *e. g. United States v. Johnson*, 319 U. S. 513; *Spies v. United States*, 317 U. S. 492; *Malone v. United States*, 94 F. (2d) 281 (C. C. A. 7), cert. den. 304 U. S. 502; *Gleckman v. United States*, 80 F. (2d) 394 (C. C. A. 8), cert. den. 297 U. S. 709; *United States v. Nuro*, 60 F. (2d) 58 (C. C. A. 2); *Oliver v. United States*, 54 F. (2d) 48 (C. C. A. 7), cert. den. 285 U. S. 540.

Point XII.

Ormont complains (O. A. B. 130-134) that the court below erred in denying his motion to strike testimony relating to the years 1942 and 1943. We disagree.

Obviously, if such testimony related only to those two years, its retention in the record could not be prejudicial to Ormont since he was acquitted on the charges relating to those years. On the other hand, evidence of Ormont's prior activities was relevant with relation to his wilfulness in failing to report his true income for 1944, and such evidence, containing as it does a basis for which

the jury could conclude that Ormont acted wilfully in failing to report his 1944 income, was clearly proper. See, *e. g.* *Ross, Skidmore, Oliver, Capone and Malone* cases *supra*; *United States v. Sullivan*, 274 U. S. 259; *Tinkoff v. United States*, 86 F. (2d) 868 (C. C. A. 7), cert. den. 301 U. S. 689.

Point XIII.

Ormont next complains (O. A. B. 135-142) that the Assistant United States Attorney prosecuting the case committed prejudicial misconduct in various ways.

First, Ormont objects to the examination of witness Link, although the court sustained the objections to the questions involved here. The court by its rulings fully protected the appellant in the trial below. Certainly no prejudicial error was committed by the exercise by the prosecutor of his right to ask questions of witnesses even though the testimony sought to be elicited was determined by the trial court not to be proper.

We agree with appellant Ormont that in certain situations, such as those referred to in the cases which he cites at this point in his brief, *where the situation warrants it*, the appellate court will order a reversal of a judgment upon finding the existence of reversible error in the record consisting of proscribed activities of the prosecutor. No such facts are present in this case. however, as an examination of the entire record will disclose.

Appellant then argues that the closing arguments of the prosecutor were of such a nature to require reversal (O. A. B. 136-142). In this respect Ormont has deliberately brought together various excerpts from the arguments and facts to imply that they were improper by giving to them meanings other than those intended by the prosecutor.

It would serve no useful purpose to discuss each of these instances separately. We respectfully suggest that this Court examine the argument in its entirety, and compare it with the evidence adduced at the trial. Such an examination will disclose that the argument of the Assistant United States Attorney in this case was proper, fully supported by the evidence, and fair to each of the appellants.

Point XIV.

Appellant asserts that the court erred in refusing to give to the jury certain instructions requested by him (O. A. B. 142-143, 149-150), and erred in giving certain other instructions (O. A. B. 143-148).

The court amply protected the appellants in its instructions to the jury and stated the applicable law in considerable detail [R. 1564-1591].

Neither of the instructions refused as to which complaint is now made, should have been given by the court, and that portion of the charge as made to which Ormont now objects, was clearly proper and fully warranted by the law and the facts in the case. See, *e. g.* *Miro*, *O'Brien*, *Oliver* and *Gusick* cases, *supra*.

Point XV.

Assignment of error is made with reference to the act of a deputy United States Marshal in coming into the court and serving a *subpoena duces tecum* upon appellant Ormont (O. A. B. 150-152).

Ormont seeks to make it appear that this was done deliberately. However, that is not true. As stated by the Assistant United States Attorney to the court upon the motion to quash the subpoena, he did not authorize that it be served in court, and he would not have permitted it to be so served had he known it was to have been done at that time [R. 806].

The service of the subpoena was brought about by the fact that the district court did not permit introduction of any evidence as to the contents of the books and records of the appellants, although they had been examined by the investigating agents who had made copies of details from them [R. 599-600]. These books and records, being the private papers of appellants, could not be obtained from them.

Upon offer of the secondary evidence, various objections were made by appellants [see *e. g.*, R. 598] as to such secondary evidence, on the ground that the books and records were of themselves the best evidence. The court excluded the secondary evidence on the ground that it was hearsay [R. 599]. When it was pointed out to the court that the books and records were not available to the Government (as appellants had them), the trial court replied "there are processes of the United States Government to use and you have the process of this court" [R. 600].

Following further discussion between the court and the prosecutor, the prosecutor sought to follow the expression

of the court, to demonstrate further to it that the books and records were unavailable as the private papers of the appellants and to lay a foundation for secondary evidence, and issued a subpoena calling for their production, as suggested apparently by the court [R. 808].

The subpoena was quashed, properly so; but the court nevertheless did not permit the use of secondary evidence of the contents of the books [see statements, R. 808-809]. See, *e. g.* *Lisansky v. United States*, 31 F. (2d) 846 (C. C. A.), cert. den. 279 U. S. 873; *McKnight v. United States*, 115 F. (2d) 972 (C. C. A. 6).

While the presence of the Deputy United States Marshal in the courtroom was unfortunate, in the light of the record before this Court as to the aggravated offenses committed by Ormont in the concealment of his true income and in his failure to pay the necessary tax, and in the light of all the facts which we have heretofore related with reference to his activities in that respect, we submit that this minor incident did not constitute prejudicial error requiring reversal of the judgment below.

Point XVI.

Appellant Ormont, without argument, calls upon this Court to examine for itself the balance of the Specifications of Error which he has set forth in his brief and to decide from that examination that the matters contained in them call for reversal of the judgment (O. A. B. 153).

Since appellant does not see fit to argue those matters, we see no point in discussing them in detail.

Suffice it to say that as to each of the unargued Specifications of Error there is no merit and that none of them should be entertained by this Court as a ground for reversal.

SECTION B.

ARGUMENT AS TO APPELLANT HIMMELFARB.

We shall discuss the points raised by Himmelfarb in his brief *seriatim*.

Point I.

Appellant Himmelfarb in his brief (H. A. B. 23, 30), examines certain bits of evidence selected by him and argues that such evidence falls short of the minimum necessary to sustain the judgment against him. Examination of the facts most favorable to the Government discloses not only that Himmelfarb is in error, but further that the facts respecting Himmelfarb are more than sufficient to support his judgment of conviction. The facts, stated more fully above, are, in substance, briefly these:¹

On March 15, 1945, Himmelfarb filed with the Collector of Internal Revenue at Los Angeles, an individual federal income tax return, on a community property basis [R. 874], for the calendar year 1944, declaring his gross income as \$4,611.74, his net taxable income as \$4,111.74, and his income tax as \$656 [*supra*, Gov. Ex. 4].

During 1944, Himmelfarb was, prior to May 1 of that year, employed by Ormont at the Acme Meat Company, a Government licensed meat wholesaler and packer, and after May 1, 1944, and until at least April 30, 1945, a partner of Ormont in that enterprise [*supra*, p. 6, Gov. Ex. 6, App. hereto]. Himmelfarb personally waited on

¹We shall, of course, refer only to those facts which the lower court admitted as against Himmelfarb.

the trade and sold meat to customers, made out invoices covering sales, collected extra or over payments in cash, and computed the weight multiplied by 3¢ and made entries on the list in the drawer [R. 429-431, 434-435].

During the investigation of Himmelfarb's and Ormont's returns, entries on books and records of the Acme Meat Company, the partnership entity, were discussed by an agent of the Bureau of Internal Revenue with Himmelfarb [R. 875-876, 879, 880, 882, 944-951], and the agent made a record of those entries [R. 875-878, 879, 882, 949-951, 967-969].

On May 23, 1945, one of the agents informed Himmelfarb that his 1944 return was being investigated [R. 885].

On May 24, 1945, Himmelfarb and Ormont filed a joint Partnership Return showing previously unreported taxable income of more than \$35,000 for each for the period from May 1, 1944, to April 30, 1945 [Gov. Ex. 6, App. hereto].

In about May 1944, Himmelfarb introduced Ormont to an insurance broker as Himmelfarb's partner [R. 913, 916, 919, 937, 939], and had a fire insurance policy, previously issued to Himmelfarb, reissued to both appellants as partners operating the Acme Meat Company [Gov. Ex. 44; R. 913-914, 923-926, 937]. The policy thus reissued was delivered to Himmelfarb and Ormont [R. 944-945]. However, when called upon to explain his status to the agents investigating his 1944 income, Himmelfarb claimed in an affidavit [Gov. Ex. 50-C; Appendix hereto] that during 1944 he was an employee of Acme Meat Company, and that between May 1, 1944, and April 30, 1945, he engaged, with Ormont, in a "joint venture," from which he received \$35,694.42 [R. *id.*].

Himmelfarb admitted in that affidavit that no part of that \$35,694.42 was reported by him on his individual Federal income tax 1944 return [R. *id.*].

In further explanation of this \$35,694.42, Himmelfarb had sent a letter to the Agents [Gov. Ex. 50-D; Appendix hereto], in which he explained, in substantiation of that amount "as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total * * * this record is accurate * * * no other records were kept * * * there was no set time for distributions [of the profits]. Distributions were made equally at various intervals. The total amount I received was \$35,694.42. This represented the total amount received by me and there were no expenses. * * * This represented both the gross and the net amount." [R. *id.*]

Himmelfarb's bank records disclosed certain of his income for 1944 [R. 372-375, 380-387, 515, 554-555, 557-560, 568-571].

The agents also had available Himmelfarb's net worth statement, prepared by Himmelfarb's certified public accountant and signed by Himmelfarb [Gov. Ex. 50-B, App. hereto], showing Himmelfarb's cash on hand, cash in banks, war bonds, and other assets, in the sum of \$42,863.45, less liabilities of \$375.94 [R. *id.*]. The "Acme Meat Company Receivable" is shown as \$3,308.45, and it is followed by the explanation that "In addition to this, $\frac{1}{2}$ of the profits for the year 1945 accrues. On April 30, 1945, this has been tentatively estimated at \$9,561.06" [R. *id.*].

As a result of their examination of all available books and records, other data introduced in evidence at the trial,

bank records, and material, both written and oral, furnished by Himmelfarb, the agents of the Bureau of Internal Revenue found that Himmelfarb received considerable income in 1944 over and above that reported by him on his income tax return for that year [R. 954-955].

Although it was Himmelfarb's contention that the \$35,694.42 income reported by him on the Partnership Return was from a separate joint venture on a fiscal year basis and, therefore, did not have to be reported on the 1944 return, the jury, by bringing in the verdict of guilty, clearly disbelieved that story and rejected Himmelfarb's contentions in that respect. By its verdict, the jury demonstrated that as a fact it found that the \$35,694.42 should have been reported, at least so much of it as was earned in 1944, on the 1944 return, and found as a fact also that there was no true joint venture on a fiscal year basis the income from which could have been properly reported on a fiscal year return. This the jury was privileged to do on the basis of the facts before it and permissive inferences from those facts.

It is manifest upon the basis of the facts summarized here, that the jury acted fully within its province in concluding that Himmelfarb wilfully attempted to defeat and evade a large part of the income tax due and owing by him for the calendar year 1944 by filing a false and fraudulent return for that year, and by concealing his true income from the United States. It is also beyond dispute that Himmelfarb's true income for 1944, on a community

property basis was, as he well knew, closer to \$17,752.65 than the \$4,111.74 which he had reported.²

The understatement of income having been established, the sole remaining question was whether it was understated wilfully, and that element of the case was plainly and properly inferrable by the jury from the facts we have delineated as to Himmelfarb.

With the law relied upon by Himmelfarb (H. A. B. 23-24), we have no quarrel. It is, however, applicable in situations of a type with which this Court is not here confronted, and it is specious to argue from that law, as Himmelfarb does in his brief, that "the verdict of the jury is without evidentiary support" (H. A. B. 23).

Himmelfarb should not now be permitted to escape the consequences of his deliberate attempt to defraud the United States. Despite the strained and technical interpretation placed upon the evidence by Himmelfarb in his brief, his guilt of the offense as to which he was convicted below, is clear. This Court should not render any aid to so gross and wilful a violator of the law. His judgment should be affirmed.

Point II.

Himmelfarb's second point (H. A. B. 41-43) is governed by the first point, since it is predicated upon the sufficiency of the evidence without rearguing the facts, it is sufficient to say that the motion for acquittal at the close of the Government's case was properly denied.

²The grand jury was not asked to and did not indict Mrs. Himmelfarb, who filed an income tax return for 1944 covering her community half of Himmelfarb's income.

Point III.

Himmelfarb complains (H. A. B. 42-50) that certain exhibits should not have been received in evidence against him, and seeks to have the judgment reversed for that reason. Himmelfarb's complaints are without foundation, as we demonstrate below.

A.

The exhibits consisted in part of Himmelfarb's and his wife's bank records (H. A. B. 42-44). These were introduced at the beginning of the trial, and were to have been, in part, the basis of the Government agents' testimony as to what they found respecting Himmelfarb's income for 1944. Upon the objections of Himmelfarb, much of the testimony offered by the Government in that connection, was rejected by the trial court.

If the exhibits on their face even in part offer support for the verdict and judgment, they are unobjectionable. And if they offer no such support, their receipt in evidence, even if erroneous, was harmless error. See, *e. g.*, the *Oliver*, *Gusick*, *Capone*, *First National Bank*, and *Gleckman* cases, *supra*.

B.

The insurance policy and insurance reports (H. A. B. 47-48) received in evidence were clearly admissible as proof of Himmelfarb's true status at the Acme Meat Company, to show his true income in 1944. Himmelfarb's inconsistent statements concerning his status given to the insurance broker and used by him in reissuing the

policy, and to the Government agents also had an important bearing upon Himmelfarb's wilfulness, his veracity in the disclosures he made to the agents, the truth of his claim that the approximately \$71,000 was earned on a fiscal year-joint venture basis, and all of the issues in the case. By showing that Himmelfarb thus varied his stories as to his status, the Government was providing a proper basis for the jury's disbelief of the fiscal year-joint venture story.

These exhibits were properly admitted in evidence.

C.

The net worth statements to which Himmelfarb now objects (H. A. B. 48-49) were prepared by his accountant and sent, under Himmelfarb's signature, to the Government agents in support of Himmelfarb's efforts to save himself after his attempt to defeat and evade the payment of his correct tax had been discovered. Certainly these documents were admissible at the trial below.

And the utility of net worth statements in the determination of a taxpayer's income, is too well established to require extensive discussion. See, *e. g.*, *Malone v. United States*, 94 F. (2d) 281 (C. C. A. 7th), cert. den. 304 U. S. 562.

Point IV.

Himmelfarb complains concerning the Government's closing arguments to the jury (H. A. B. 50-63). Plainly Himmelfarb here seeks to divert attention from his own patent guilt by pointing an accusing finger elsewhere. In this he fails.

It would be of but little or no value to this Court to review the evidentiary basis for the closing argument made by the Government, or to discuss the argument in detail. We respectfully suggest that this Court read all of the arguments of all counsel [R. 1450ff.], so that the propriety of the Government's argument can be most clearly seen.

A.

Himmelfarb appears to object to the changing use of the plural pronoun "they"—referring to him and Ormont—and the singular pronoun "he," or appellants' individual names, during the course of the Government's arguments. Himmelfarb conveniently overlooks the fact that this change was necessitated by the limited admission of certain of the evidence, due principally to Himmelfarb's own objections, as well as Ormont's, with which the record abounds.

The entire argument of the Government was plainly within proper bounds and was in direct keeping with the evidence in the record and the permissive inferences to be drawn from it. Himmelfarb plainly has no cause to complain on this score.

The trial was long, primarily due to appellants' minute examination of witnesses and exhibits, and the jury was

clearly aware of what appellants had done collectively and individually. The jury was not confused as to the basic facts in this case; facts which were disclosed *from the original 1944 returns, together with the "Partnership Return" filed in May, 1945, and the documents, including the letters, net worth statements and affidavits*—and eliminating from consideration for the moment all other evidence in the record—that appellants and each of them individually received a far greater income in 1944 than they had reported, that the unreported sums were net income; that they had no records other than the cumulative totals; and that they admittedly did not include upon their 1944 income returns substantial funds received by them. These undenied facts, flowing primarily from appellants, were enough, without more, to warrant a verdict of guilty upon the charges in this case. And there was more evidence, of course, as we have shown above.

Himmelfarb clearly was not prejudiced by the Government's arguments to the jury.

B.

Himmelfarb also objects (H. A. B. 59-60) to the reference by the Government to the availability to him of the testimony of two witnesses, Malin and Moody, and his failure to call them to the stand. This is a slick argument. It fails to apprise the Court, however, of the fact that the Government mentioned these men only. Himmelfarb's own counsel in his closing argument to the jury had called attention to the limited extent to which Malin testified [R. 1501-1502] and was the first to mention Moody, in a manner creating the inference that Moody may have been responsible for the contents of Himmelfarb's return [R. 1507]. We think the Govern-

ment had the right to answer the argument made by Himmelfarb's counsel.

Furthermore, there is nothing wrong in an *argument* to the effect that certain witnesses were available to defendant but were not called by him to the stand, especially where, as here, the defendant himself makes the first reference to such matters.

And the trial court adequately protected appellant by its instructions as to the entire burden of proof being on the Government, the presumption of innocence and others [R. 1564ff, 1588].

Himmelfarb's cases cited in his brief (H. A. B. 60-61] to the general, and in this case wholly inapplicable proposition of law that misconduct of counsel and improper argument "in extreme cases" warrants (but does not mandatorily require) a reversal, only demonstrates further the paucity of legal support for his untenable contentions in this case, and the extremes to which he must go in his efforts to extricate himself from the eminently proper judgment below.

The fact that no objection was raised by Himmelfarb at the time of the argument is conceded by him (H. A. B. 61). His strained efforts (H. A. B. 61-63) to shift elsewhere the blame for this neglect on his part, are unworthy of consideration. He says he made no objection because he knew that "the trial judge was laboring under" a "misapprehension," and he knew that he was thus "fore-doomed with respect to any such objection," and he did not want to "emphasize such improper argument" before the jury (H. A. B. 61-62). This contention is clearly frivolous in its entirety.

Point V.

Himmelfarb complains (H. A. B. 64-72) that certain instructions requested by him were refused by the trial court.

Examination of the instructions actually given to the jury [R. 1564-1591] discloses that the jurors were advised fully as to the law and the rights of appellants. The specific instructions refused were either not proper statements of the law or did not reflect the evidence in the case (Instr. 17, H. A. B. 64; Instr. 25, H. A. B. 66; Instr. 27, H. A. B. 67; Instr. 28, H. A. B. 68; Instr. 30, H. A. B. 69; Instr. 35, H. A. B. 70) or were given in another form (Instr. 22, H. A. B. 65; Instr. 35, H. A. B. 70), and the cases cited by appellant Himmelfarb at this point (H. A. B. 71-73) are of no assistance to him.

Point VI.

The contentions (H. A. B. 73-74) that the trial court erred in denying Himmelfarb's motion for acquittal notwithstanding the verdict and for a new trial, are without merit.

We have already discussed the facts and the law in this case. Nothing in either required the trial court to set aside the verdict of the jury and acquit Himmelfarb or to grant to him a new trial.

Himmelfarb was given a fair trial, and no error was committed as to him requiring reversal of his judgment and sentence. Upon all the circumstances disclosed by the facts herein, the sentence was clearly reasonable and just.

Summary.

The evidence in this case presents a gross violation of Federal law by appellants Ormont and Himmelfarb in connection with their 1944 income tax returns. Appellants were more than adequately protected throughout the trial by the rulings of the trial judge and by the activities of their counsel. Evidence of a type, which, we submit, should have been admitted into the record, was excluded by the Court upon motion of either one or the other of the appellants, and the contents of various records and documents to which the investigating agents had been given access could not be brought before the jury because of the absence of the original, private books and records of the appellants and which they had, upon which the Court predicated its refusal to admit other evidence showing their contents.

The unusual length of the briefs filed by each of the appellants is not a coincidence; they required considerable space to set forth each of the minor and insignificant objections upon which they place their last hope of escape from the consequences of their illegal acts.

Each of the appellants was clearly guilty of the offense charged against him. Their efforts before this Court to set aside the eminently proper verdicts below and the judgments against them should be rejected by this Court.

Conclusion.

No reversible error was committed by the trial judge or by the prosecuting attorney. The appellants were given a fair trial. The verdicts are supported by the evidence. The sentences are moderate and clearly justified in the light of all the circumstances. The judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney;

ERNEST A. TOLIN,
Assistant United States Attorney;
Attorneys for Appellee.

APPENDIX.

Exhibit 50-B.

PHILLIP HIMMELFARB

Net Worth Statement

April 30, 1945

ASSETS

Cash on Hand	\$22,261.85
Cash in Banks:	
Bank of America—Vernon Branch:	
Phillips Meat Co.—Checking Account	4,236.73
Savings Account	3,687.88
Bank of America—First & Chicago Street Branch	
Checking Account	564.99
War Bonds (at cost) 10—\$25.00 “E” Bonds	187.50
Fixed Assets:—(at cost)	
4 Family Unit—116 N. Soto Street	6,500.00
Automobile	1,100.00
Truck—(Bought Dec. 1943)	798.75
Adding Machine 5/1/44	217.30
*Acme Meat Company Receivable	3,308.45
	<hr/>
TOTAL ASSETS	\$42,863.45

=====

LIABILITIES

Thelma Himmelfarb (Mother)	\$ 212.00
Mortgage Payable on Real Estate	163.94
	<hr/>
Total Liabilities	375.94
Net Worth	42,487.51
TOTAL LIABILITIES AND NET WORTH	\$42,863.45
	<hr/> <hr/> <hr/>

*In addition to this, 1/2 of the profits for the year 1945 accrues. On April 30, 1945, this has been tentatively estimated at \$9,561.06.

The above statement is correct to the best of my knowledge and belief.

July 30, 1945.

PHILLIP HIMMELFARB

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 50-B. Date Jun 6-1947 No. 50-B Identification. Date Jun 6-1947 No. 50-B in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 50-C.

State of California, County of Los Angeles—ss.

AFFIDAVIT OF PHILLIP HIMMELFARB

I, Phillip Himmelfarb, being first duly sworn and being of lawful age, depose and state:

That during the year 1944 I was an employee of the Acme Meat Company;

That during the period commencing with May 1, 1944, and ending on April 30, 1945, I received from the joint venture, which I have engaged in with Samuel Ormont, the sum of \$35,694.42; Samuel Ormont received from this joint venture a similar amount;

That the total amount of this aforementioned income received by me was not reported by me for the calendar year 1944 but was reported in full in a joint venture return for the period commencing with May 1, 1944, and ending on April 30, 1945.

PHILLIP HIMMELFARB

Affiant.

Subscribed and sworn to before me this 28th day of July, 1945.

[Seal]

ELMER F. WILSON,

Notary Public in and for said County and State.

In and for the County of Los Angeles, State of California.

My Commission Expires March 22, 1949.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 50-C. Date Jun 6-1947 No. 50-C Identification. Date Jun 6-1947 No. 50-A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 50-D.

Los Angeles, California

July 30, 1945

Mr. Donald Bircher, Special Agent
Federal Building
Los Angeles, California

Dear Mr. Bircher:

In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total.

This record is accurate to the best of my knowledge and belief. No other records were kept. All of the money received is represented by the total reported.

Respecting the division of the profits:

You ask if we divided the profits weekly, monthly or at the end of the fiscal year. In answer to that, there was no set time for distributions. Distributions were made at various intervals.

The total amount I received was \$35,694.42. This represented the total amount received by me and there were no expenses.

Respecting your inquiry whether the total reported was both the gross and the net, the answer is yes. This represented both the gross and the net amount.

Very truly yours,

PHILLIP HIMMELFARB

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 50-D. Date Jun 6-1947 No. 50-D Identification. Date Jun 6 1947 No. 50-D in Evidence. Clerk, U. S. District Court, Sou. Dist of Calif. J. M. Horn, Deputy Clerk.

Exhibit 51-A.
SAMUEL ORMONT
BALANCE SHEET
April 30, 1945

Statement of Net Worth

Cash in Bank:

Bank of America—Brooklyn Soto Branch	
Savings Account	\$ 55.28
Security First National Bank	
Commercial Account	10,765.57
Cash on Hand—Estimated	400.00
Government Bonds (Cost)	92,412.50
Capital Account—Acme Meat Company	37,813.16
Profits 1/1/45 to 4/30/45	9,561.06
	<hr/>
TOTAL	\$151,007.57

Note:

The Capital Account of Samuel Ormont on the books of Acme Meat Company at 4/30/45 shows the balance of \$37,813.16 before profits for the period 1/1 to 4/30/45. Included in liabilities is the account of Dora Goldberg, \$16,800.00, which was set up to reflect the taxpayer's estimate of the amount due to his mother.

The above statement is correct to the best of my knowledge and belief.

July 30, 1945.

SAMUEL ORMONT.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 51-A. Date Jun. 6, 1947, No. 51-A identification. Date Jun. 6, 1947, No. 51-A in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 51-C.

Los Angeles, California

July 30, 1945

Mr. Donald Bircher, Special Agent

Federal Building

Los Angeles, California

Dear Mr. Bircher:

In answer to your inquiry substantiating the amount of \$35,694.42 as my share of the profits from the joint venture, we kept a cumulative record. Each time additional amounts were received, these were added to the previous accumulated total.

This record is accurate to the best of my knowledge and belief. No other records were kept. All of the money received is represented by the total reported.

Respecting the division of the profits:

You ask if we divided the profits weekly, monthly or at the end of the fiscal year. In answer to that, there was no set time for distributions. Distributions were made at various intervals.

The total amount I received was \$35,694.42. This represented the total amount received by me and there were no expenses.

Respecting your inquiry whether the total reported was both the gross and the net, the answer is yes. This represented both the gross and the net amount.

Very truly yours,

SAMUEL ORMONT.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit #51-C. Date Jun. 6, 1947, No. 51-C identification. Date Jun. 6, 1947, No. 51-C in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

Exhibit 51-D.

State of California, County of Los Angeles—ss.

AFFIDAVIT OF SAMUEL ORMONT.

I, SAMUEL ORMONT, being first duly sworn, depose and state:

That I am the owner of a meat packing business, conducted by me under the name Acme Meat Company:

That during the period commencing with May 1, 1944, and ending on April 30, 1945, I received from a joint venture between myself and one Phillip Himmelfarb, as my share of the profits therefrom, a sum totaling \$35,694.42;

That this amount was not recorded on the books of the Acme Meat Company because it belonged to the joint venture;

That the total amount was not reported by me as income for the calendar year 1944 but was reported in full in a joint venture return for the period commencing with May 1, 1944, and ending on April 30, 1945;

That Phillip Himmelfarb received a similar amount from this joint venture.

SAMUEL ORMONT,
Affiant.

Subscribed and sworn to before me this 27th day of July, 1945.

(SEAL)

F. P. PHILLIPS,

Notary Public in and for said County and State.

Case No. 19138-Cr. U. S. A. vs. Ormont. U. S. Exhibit 51-D. Date Jun. 6, 1947, No. 51-D identification. Date Jun. 6, 1947, No. 51-D in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

and 1944 and
 the best of my knowledge and belief
 constitute the total net income received by
 me which was not reported in my Federal
 income tax return
 received pursuant to report 1944. Since the amount
 has been an ongoing matter and has not been
 paid from and to.

Exhibit 2.

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SECRET

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71,388 84

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 7)

Page 2

Description of obligations or securities

Interest and dividends received or accrued during the year

Subject to surtax only:

- (a) United States savings bonds and Treasury bonds issued prior to March 1, 1941. (Amount owned at end of year, \$)
- (c) Obligations of instrumentalities of the United States issued prior to March 1, 1941 (other than Federal land banks, Federal intermediate credit banks, and joint-stock land banks)
- (d) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942.
- (e) Total: \$
- (f) Less: Amortizable bond premium \$
- (g) Balance of interest. (Enter as item 7(c), page 1.) \$

Subject to normal tax and surtax:

- (a) Treasury notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or institutionality thereof
- (c) Less: Amortizable bond premium \$
- (d) Balance of interest. (Enter as item 7(b), page 1.) \$

Schedule B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expressed sale and cost of improvements when acquired (See instructions or Schedule B, 1(b).)	6. Depreciation allowed (or allowable) since acquisition (See instructions or Schedule B, 1(b).)	7. Gain or loss (column 3, plus column 5, less the sum of columns 4 and 6)
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$

Total net gain (or loss) (enter as item 10, page 1)

NOTE.—If any item in Schedule B was acquired by the organization at a price less than its purchase price, attach a statement explaining how acquired.

Schedule C.—TAXES. (See Instruction 18)

Nature	Amount	Nature (continued)	Amount (continued)
	\$		\$
	\$		\$
	\$		\$
	\$		\$
	\$		\$
	\$		\$

Total (enter as item 18, page 1)

Schedule D.—BAD DEBTS. (See Instruction 20)

1. Taxable year	2. Net income reported	3. Bad debts as a result of operations	4. Bad debts as a result of operations (See instructions or Schedule D, 1(b).)	5. Amount added to reserve (See instructions or Schedule D, 1(b).)	6. Amount charged against reserve
1941	\$	\$	\$	\$	\$
1942	\$	\$	\$	\$	\$
1943	\$	\$	\$	\$	\$
1944	\$	\$	\$	\$	\$

NOTE.—Check whether deduction claimed represents debts which have become worthless, or in addition to a reserve.

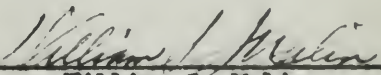
Schedule E.—DEPRECIATION. (See Instruction 21)

1. Date acquired	2. Date placed in service	3. Cost or other basis (See instructions or Schedule E, 1(b).)	4. Depreciable basis at end of year (See instructions or Schedule E, 1(b).)	5. Depreciation allowed (See instructions or Schedule E, 1(b).)	6. Remaining basis at end of year (See instructions or Schedule E, 1(b).)	7. Estimated life used (See instructions or Schedule E, 1(b).)	8. Estimated depreciation for year (See instructions or Schedule E, 1(b).)	9. Depreciation allowed for year (See instructions or Schedule E, 1(b).)
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$
		\$	\$	\$	\$		\$	\$

Sam Ormont and Phillip Himmelfarbe

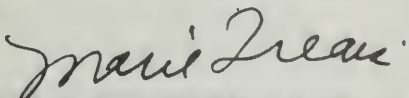
Year Ending 4/30/45

This return has been prepared from information furnished by the taxpayers, without audit or independent verification on my part.


William S. Malin

Subscribed and sworn to before me this

24th day of May, 1945.


Notary Public Los Angeles Co., Calif.

